NO. 86-58

Supreme Court, U.S.
FILED
JUL 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRED S. JAMES & CO. OF TEXAS, INC.
Petitioner

VERSUS

EQUILEASE CORPORATION,
M/V SAMSON, M/V THOR, and M/V HERCULES, ETC.
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a creditor of a vessel who looks to the real owner and the earnings of the vessel for payment but who expressly states that he intends to give up nothing, waive his right to a maritime lien.

2. May an appellate court reverse a trial court's implicit finding of fact without a showing of the finding being clearly erroneous.

3. Is there a true demise or bareboat charter of the vessel where the owner of a vessel creates and finances the "charterer", controls all operations, revenues and expenditures of the vessel and receives all income.

CERTIFICATE OF INTERESTED PARTIES PURSUANT TO RULE 21.1(B)

The undersigned counsel of record for FRED S. JAMES & CO. OF TEXAS, INC., Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

FRED S. JAMES & CO. OF TEXAS, INC.

FRED S. JAMES, INC.

NUMEROUS AFFILIATES BEARING THE NAME FRED S. JAMES OF (STATE), INC.

EQUILEASE CORPORATION

AFFILIATES BEARING THE NAME OF UNILEASE NO. (NUMERICAL DESIGNATION), INC.

ELTRA CORPORATION

ALLIED CORPORATION

DUNNAMIS OFFSHORE TOWING, INC.

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REFERENCE TO OPINIONS

The Opinion of the United States District Court for the Eastern District of Louisiana, March 18, 1983, is published in 568 F.Supp. 1259 (E.D.La. 1983).

The First Opinion of the United States Court of Appeals for the Fifth Circuit, September 27, 1984, is published in 742 F.2d 852 (5th Cir. 1984).

The Second Opinion of the United States Court of Appeals for the Fifth Circuit, April 1, 1985, is published in 756 F.2d 357 (5th Cir. 1985).

The En Banc Opinion of the United States Court of Appeals for the Fifth Circuit, April 25, 1986, as amended by letter dated May 5, 1986, and as amended by letter dated May 28, 1986, is published in ___ F.2d ___ (5th Cir. 1986).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit on April 25, 1986, as amended by letter dated May 5, 1986, and as amended by letter dated May 28, 1986, which reinstates Parts II, III,

IV and V of the Second Opinion, and reverses the Judgment of the trial court. No re-hearing was sought of the En Banc Opinion.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 17, et seq. of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the Ship Mortgage Act, 46 U.S.C. §911, et seq. and the Admiralty and General Maritime Laws of the United States.

STATUTES INVOLVED

Applicable to the resolution of this matter are the following statutes:

46 U.S.C. §971. PERSONS ENTITLED TO LIEN:

> Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon

the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, **and it shall not be necessary to allege or prove that credit was given to the vessel.**

June 5, 1920, c.250, §30, Subsec. P, 41 Stat. 1005. (emphasis supplied)

46 U.S.C. §974. WAIVER OF RIGHT TO LIEN:

Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or **other necessaries**, or the mortgagee, **from waiving his right to a lien**, or in the case of a preferred mortgage lien, to the preferred status of such lien, **at any time by agreement or otherwise**; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel

for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

June 5, 1920, c.250, §30, Subsec.S, 41 Stat. 1005. (emphasis supplied)

STATEMENT OF THE CASE

A) COURSE OF PROCEEDINGS AND DISPOSITION IN THE TRIAL COURT.

On January 19, 1981, Fred S. James & Co. of Texas, Inc. ("James") filed a Complaint against Equilease Corporation ("Equilease"), Dunnamis Offshore Towing, Inc. ("Dunnamis"), Unilease No. 13, Inc., Unilease No. 14, Inc., and Unilease No. 20, Inc. ("the Unilease Companies") and against M/V SAMSON, M/V THOR, and M/V HERCULES ("the Vessels"), in rem, for premiums due and payable for marine

insurance on the Vessels.[1] Additionally, James filed a Complaint in Intervention in the proceedings for the foreclosure of the preferred ship mortgages claiming state and maritime liens against the Vessels in rem and in personam claims against Equilease, the Unilease Companies and Dunnamis. The claim of James, based upon (a) maritime lien, (b) state lien, (c) agency (invalid demise charter), and (d) unjust enrichment, was tried before the Honorable Henry A. Mentz, Jr. commencing January 3, 1983. A Judgment was rendered by the district court on March 18, 1983, holding that: (a) the Unilease Companies were the alter-egos of Equilease; (b) the purported preferred ship mortgages were void; (c) as a practical matter, insurance falls into the class of "other necessaries". As a legal matter, however, insurance does not fall into that class[2]; and (d) the

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1. For the sake of brevity, Equilease and the Unilease Companies will be referred to as the Equilease Companies unless a separate distinction need be made.

2. 568 F.Supp. 1259 (E.D.La. 1983).

claim of James for the insurance premiums gave rise to a valid state lien under the Louisiana Civil Code.

B) COURSE OF PROCEEDINGS AND DISPOSITION IN THE APPELLATE COURT.

An appeal was filed by the Equilease Companies to the Fifth Circuit, and James, in order to protect its claims under the other three theories of recovery, filed a cross-appeal. On September 27, 1984, the Fifth Circuit rendered its decision ("the First Opinion") affirming the Judgment of the district court. A Petition for Rehearing was filed by the Equilease Companies and, on April 1, 1985, the Fifth Circuit, without further argument, rendered an opinion ("the Second Opinion") which withdrew the First Opinion and reversed the Judgment of the district court.

Granting en banc consideration, the Fifth Circuit, in a divided Opinion ("the En Banc Opinion"), unanimously held that marine insurance is a

"necessary" under the Federal Maritime Lien Act[3] ("FMLA") and thus may be given the status of a "federal maritime lien", but denied recovery to James "because it has been shown to have not relied on the credit of the vessels". The Majority Opinion was amended on May 5, 1986 and May 28, 1986 by letters from the Clerk.

STATEMENT OF FACTS

This is a claim for insurance premiums on three documented, ocean-going tugs ("the Vessels") by an insurance broker. The record will reflect that the original owner, Equilease, in order to insulate itself and the Vessels from the claims of legitimate creditors, transferred the Vessels to the Unilease Companies, three wholly-owned "shelf" corporations of Equilease, and caused the Unilease Companies to execute "preferred ship mortgages" in favor of Equilease in an amount greater than the fair market values of the Vessels. To further insulate itself,

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3. 46 U.S.C. §971 et seq.

Equilease caused the Vessels to be "bareboat chartered" to Dunnamis[4] with Equilease retaining control over the operations and management of the Vessels, and, under collateral security agreements, received all revenues from the operations of the Vessels. At the time of the execution of the mortgages and charters, Equilease knew that the Unilease Companies could not satisfy the mortgage indebtedness and that Dunnamis could not satisfy the charter hire.

Equilease persuaded James to provide specified insurance on the Vessels including hull, protection and indemnity, towage, pollution, war risk and excess coverages. After two years of operations and receipt of revenues from the Vessels, the mortgagee,

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4. The initial charter was to Solar, Inc., a company owned and controlled by James "Spec" Denning. In that Solar and Denning were judgment debtors on a similar transaction in the amount of $768,242.98 and Equilease had instituted foreclosure proceedings against Solar and Denning on another financing agreement, Equilease caused Denning to form Dunnamis and transfer the charter parties and other security agreements from Solar to Dunnamis.

Equilease, ordered Dunnamis to return the Vessels to a U.S. port in order to foreclose upon its purported "preferred ship mortgages" and re-obtained title to the Vessels, free and clear of all liens and encumbrances, at a U.S. Marshal's sale for $10,000 each.[5] The Unilease Companies and Dunnamis were left hopelessly insolvent with creditors and lienors, including James, left unpaid.

At trial, it was shown that the Unilease Companies had no substance, virtually no corporate records, no bank accounts and were totally dominated and controlled in form and substance by Equilease. As to the purported charters, the charter parties provided that "all operations, revenues and expenditures were to be approved by owner

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5. James contended that each of the Vessels had a value of approximately $3 Million. The mortgages against the Vessels were in excess of $5 Million each. There can be no question that there was collusion between mortgagor and mortgagees in the foreclosure proceeding in order that Equilease could obtain clear title to the Vessels without any payment of cash.

[Equilease] in its sole discretion".[6] Pursuant to this authority and control, Equilease approved, advanced and paid the initial operating expenses of Dunnamis by direct payment and/or advances, Equilease established the manner in which the books and records of Dunnamis would be maintained, and Equilease participated in negotiations of various contracts and charter parties for the operations of the Vessels.

Except for the insurance supplied by James, the Vessels would not have been permitted by Equilease to operate and the Vessels could not have engaged in commercial transactions. Without insurance, Equilease would not have obtained any revenues from the Vessels.

SUMMARY OF THE ARGUMENT

Petitioner suggests that the En Banc Opinion of the Fifth Circuit is contrary to statutory law, is in conflict with prior decisions of this Court and

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6. Paragraph 18 of the Bareboat Charter Parties.

with decisions of the other Circuits. If allowed to stand, the En Banc Opinion will foster and condone fraud in marine financial transactions and will generate litigation.

Rarely has a case undergone such a tortuous course through an appellate court. The First Opinion affirmed the decision of the trial court which recognized the state granted privilege for the premium of marine insurance. The Second Opinion held that the state lien was extinguished by peremption, a form of prescription that cannot be extended. In the Third and En Banc Opinion, as amended, the Fifth Circuit, overruling 100 years of precedent, unanimously recognized that marine insurance is no longer an optional contract for the sole benefit of an owner of a vessel, but "is essential to keep a vessel in commerce."[7] While recognizing that James was entitled to a lien for the premiums

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7. Equilease, et al v. M/V SAMPSON, et al, ____ F.2d ____ (5th Cir. 1986) - Appendix D, page A-68 at A-89.

that it had advanced for the insurance on the Vessels, the Majority held that James had not relied on the credit of the Vessels and, accordingly, had waived its lien.

Aside from misconstruing two sources in the record,[8] the Majority relied upon the novel legal theory that James was not entitled to a maritime lien in that the right and privilege for marine insurance had not been previously recognized by a court. If this theory was carried into practice, Miranda would not have been entitled to his warning, Bakke would not have been entitled to admission to medical school, Gideon would not have been entitled to his attorney, Reliable Transfer would not have

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8. The extract of testimony relied upon by the Majority is taken totally out of context and without reference to the substance of the witness' testimony. That single sentence extracted from one of nine (9) appeal briefs filed by Petitioner was in a section dealing solely with the fraudulent nature of the purported preferred ship mortgages on the Vessels and the term "parties" referred to the mortgagors and mortgagees. The dissenting Opinion places a proper interpretation on the lexicality of the testimony and of the brief.

been entitled to apportionment, and others would have been denied rights which had not been previously recognized by this Court.

ARGUMENT

MAY IT PLEASE THE COURT:

I.

WAIVER OF THE LIEN

The En Banc Opinion is contrary to the FMLA[9], the decisions of this Court in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.,[10] and Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of California,[11] the decision of the First Circuit in Farrell Ocean Services v. U.S.,[12] and the decision of the Ninth Circuit in Farwest Steel Corp. v. barge SEA-SPAN 241.[13]

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9. 46 U.S.C. §971.

10. 254 U.S. 1, 41 S.Ct. 1 (1920).

11. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

12. 681 F.2d 91 (1st Cir. 1982).

13. 769 F.2d 620 (9th Cir. 1985).

The intent and purpose of the FMLA was to simplify and clarify the rules as to maritime liens as to which there had been much confusion. The Act did away with the doctrine that when the owner of a vessel contracted in person for necessaries or was present in the port when they were ordered, it was presumed that the materialman did not intend to rely upon the credit of the vessels. In clear and unmistakable language, the FMLA provides: "it shall not be necessary to allege or prove that credit was given to the vessel".

Where the claimant furnished oil upon the order and credit of the charterer, accepted a pledge of securities and proceeds thereof, released the pledge and executed a credit agreement with the charterer, this Court, holding that the lien had not been waived, stated in Dampskibsselskabet Dannebrog v. Signal Oil and Gas Co.,[14]:

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14. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940)

> ... the statute provided a series of simple and comprehensive rules. While it was said not to be intended to change the general principles of the law of maritime liens, it was intended to operate in aid of those who supply necessaries to ships and it correspondingly restricted the rights of the owners of the vessels. Any person furnishing repairs, supplies, etc., to a vessel whether foreign or domestic, 'upon the order of the owner' or 'of a person authorized by the owner', is to have a maritime lien which may be enforced by suit in rem. **It is not necessary to allege or prove that credit was given to the vessel.**[15] (emphasis added)

If the vessel owner points to conduct other than an agreement, there must be proof of affirmative actions that manifest the lien claimant's clear intention to forego the lien.

In circumstances similar to those in the present case, the First Circuit in Farrell Ocean Services v. U.S.,[16] specifically stating that the analysis of the facts by the district court was clearly erroneous, reversed the trial judge's findings that the claimant

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15. 310 U.S. 268, 272, 60 S.Ct. 937, 940, 84 L.Ed. 998 (1940).

16. 681 F.2d 91 (1st Cir. 1982).

had waived his right to a lien. In reviewing similar factual allegations to those made in this case, the First Circuit held:

> It is not enough, however, to show that the supplier relied in part on the credit of the owner's agent or the owner. See The Everosa, 93 F.2d 732, 735 (1st Cir. 1937). The party entitled to the lien must have taken affirmative actions that manifest a clear intention to forego the lien.[17]

From the record, it can be clearly shown that James did not rely upon the owners (the Unilease Companies) of the Vessels, as James had never had any knowledge of the Unilease Companies. James could not have relied solely upon the charterer in that it did not meet with Dunnamis until one year after the initial transaction and, not having any knowledge of the financial condition of Dunnamis, would not have relied solely upon the credit of Dunnamis.

On the contrary, James was induced to continue providing insurance based upon assertions by

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17. 681 F.2d 91, 94.

Equilease that, among other things, including the implication of payment by Equilease, the Vessels would be under profitable charter in Mexico and would be able to pay the insurance premiums. As stated by the Fifth Circuit in Fielder v. Bay Const. Co.[18]:

> The same reasoning is as applicable to the earnings of a dredge boat as it is to rents derived from land. One who has a lien recognized in admiralty waives it by accepting the credit of the owner. **But reliance upon the earnings of a vessel shows conclusively that the lien is not waived,** and that the creditor is unwilling to accept the liability of its owner.[19] (emphasis supplied)

A totally inconsistent ruling is to be found in Barnes v. The Kongo,[20] however, there is no explanation or reason by the Sixth Circuit to justify

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18. 5 F.2d 227 (5th Cir. 1925).

19. 5 F.2d 227, 228.

20. 174 F.2d 67 (6th Cir. 1949).

the logic that reliance upon the earnings of a vessel, her sole source of funds to pay creditors, constitutes a waiver.

There is not one scintilla of evidence which indicates that James **affirmatively** manifested an intention to forego the lien and as stated by the account executive of James, "there is no intent for us to give up anything".[21] Additionally, under cross-examination, the account executive testified that "[James] wanted to stay on the risk because there was considerable money to be made at the time out of the boats".[22] This is irrefutable evidence that James relied upon the credit of the Vessels.

By filing Notices of Liens in the Mortgage Office of the Parish of Orleans when the Vessels returned to the United States, by filing a separate

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21. Trial Testimony, pg.133. The Majority suggests that this response was solicited in direct examination by James. A reading of the transcript shows that the statement is in response to a question by the trial judge.

22. Trial Transcript, pg.158.

action against the Vessels, and by intervening in the foreclosure proceedings, James took affirmative action demonstrating its reliance upon the credit of the Vessels. It defies logical reasoning that James would waive a valuable privilege without receiving some alternative security which it did not receive.

In petitioning this Court for Certiorari, James suggests that the En Banc Opinion of the Fifth Circuit will create confusion not only within the Fifth Circuit but all Circuits and, as forewarned by the dissent, an inordinate amount of unproductive trial time will be expended in an attempt to divine the subjective thoughts of the "lienor". The En Banc decision will create litigation in an area which the commentators thought had become, "a sort of ghostly echo from the past and the presumption that the lienor relied on his lien has become all but

conclusive".[23]

II.

CLEARLY ERRONEOUS

The En Banc Opinion of the Fifth Circuit is totally contrary to the decisions of this Court in Icicle Seafoods, Inc. v. Northington,[24] Anderson v. Bessemer City,[25] Guzman v. Pichirilo,[26] McAllister v. United States[27]. Without in any way expressing that the findings of the district court were "clearly

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23. Gilmore and Black, The Law of Admiralty, Second Edition, 668; See Point Landing, Inc. v. Alabama Dry Dock, 261 F.2d 861 (5th Cir. 1958); Gulf Trading & Transportation Co. v. The Vessel HOEGH SHIELD, 658 F.2d 363 (5th Cir. 1981), cert. denied, 457 U.S. 1119 (1982); Gulf Oil Trading v. M/V CARIBE MAR, 757 F.2d 743 (5th Cir. 1985); Sasportes v. M/V SOL DE COPACABANA, 581 F.2d 1204 (5th Cir. 1978).

24. ____ U.S. _____, 106 S.Ct. 1527, 88 L.Ed.2d 224, 332 (1986).

25. 470 U.S. _____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

26. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed.2d 205 (1962).

27. 348 U.S. 19, 20, 75 S.Ct. 6, 7, 99 L.Ed. 20 (1954).

erroneous" and that it was "left with a definite and firm conviction that a mistake [had] been committed", the Fifth Circuit reversed the district court based upon two lines of testimony in a trial that lasted three days. If the Ninth Circuit applied a "de novo" standard of review in Icicle, then the Fifth Circuit expands the "de novo" rule one step further by reversing the finding implicit in its First Opinion that the credit of the vessel had been relied upon and that there had been no waiver.

In the decision of the trial court granting judgment on the basis of the state created lien, the finding that James had relied upon the credit of the vessel and had taken no action to constitute a waiver of its right to its privilege and lien was also implicit. Under provisions almost identical to those of the FMLA, a lien and privilege under the Louisiana Civil

Code may be implicitly or explicitly waived.[28]

By affirming the district court in the First Opinion, the Fifth Circuit, with the allegations and arguments of waiver before it, tacitly, if not explicitly, recognized that James had relied upon the credit of the vessel and had not waived the state privilege. It was not until the third time that this case had been decided by the Fifth Circuit that the defense of waiver or reliance upon the credit of the vessel was mentioned. Relying upon a two line excerpt from the record, the En Banc Majority concludes, without a finding of clearly erroneous, that the trial judge's interpretation of three days of live testimony and review of voluminous records differed from the appellate court's divination of a two line excerpt from the record.

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28. Houma Steel and Supply, Inc. v. Allied Towing Services, Inc., 468 So.2d 637 (La.App. 4th Cir. 1985); Universal Elec. Const. Co. v. Liner, 281 So.2d 830 (La.App. 1st Cir. 1973), writ denied, 283 So.2d 501 (1973).

Under Rule 52(a) of the Federal Rules of Civil Procedure, in determining whether the district court's findings are clearly erroneous, the appellate court must construe the evidence in the light most favorable to the appellee.[29] The district court, in its opinion,[30] found that, under a changing environment, "as a practical matter", insurance falls into the class of other "necessaries", but that it had no authority to overrule the Fifth and other Circuits.[31] Accordingly, no direct ruling was made upon a waiver of the lien and privilege of the FMLA. Nevertheless, the trial court found that there was reliance on the state created lien under Louisiana Civil Code Article 3237(10), implicitly finding that James had not waived its right to that lien.

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29. Walker Transportation Co. v. Neylon, 396 F.2d 558, 565 (8th Cir. 1968); North American Van Lines, Inc. v. Brown, 248 F.2d 905, 914 (8th Cir. 1957); Ente Nazionale Per L'Energia v. Baliwag Nav., 774 F.2d 648 (4th Cir. 1985).

30. 568 F.Supp. 1259 (E.D.La. 1983).

31. 568 F.Supp. 1259, 1264; Appendix A, A-17.

In initially affirming the trial court's decision, the Fifth Circuit was left with no definite and firm conviction that a mistake had been committed and tacitly recognized that there had been no waiver. The Court stated, "[h]ere, the privilege against the [V]essels secured the debt in either form."[32] Twenty (20) months later, without remand to the district court or any further evidence being introduced, the finding was reversed.[33]

As stated by the Chief Justice, "duplication of the trial judge's efforts in the Court of Appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources".[34] Already, the En Banc Opinion is fostering controversy and a diversion

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32. 742 F.2d 852, 857; Appendix B, page A-23, A-38.

33. In total reliance upon the First Opinion and the prevailing precedent, Petitioner spent exactly two lines on the waiver of the lien in a 43-page en banc brief.

34. Icicle Seafoods, Inc. v. Northington, 106 S.Ct. 1527, 1530, Supra.

of judicial recourses in the Fifth and Ninth Circuits.[35] If there is a question of fact that was left unresolved by the absence of a specific finding of the trial court, then the appropriate course of action would be a remand to the trial court for a specific finding of fact.

III.

BAREBOAT CHARTER

The En Banc Opinion is contrary to the decision of this Court in Marcardier v. Chesapeake Insurance Co.,[36] United States v. Shea,[37] Leary v. United States,[38] Reed v. United States,[39] Guzman v. Pichirilo,[40] the First Circuit's decision in Stephenson

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35. Counsel for James has been approached by attorneys in these Circuits seeking trial and appellate briefs for trial and appellate proceedings relating to the FMLA.

36. 12 U.S. (8 Cranch) 39 (1814).

37. 152 U.S. 178, 14 S.Ct. 519, 38 L.Ed. 403 (1894).

38. 81 U.S. (14 Wall.) 607, 20 L.Ed. 756 (1872).

39. 78 U.S. (11 Wall.) 591, 20 L.Ed. 220 (1871).

40. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed. 518 (1962).

v. Star-Kist Caribe, Inc.[41] and with the decision of the Second Circuit in Hansen v. E. I. Dupont De Nemours & Company, Inc.,[42] Vitozi v. Balboa Shipping Co.,[43] and Blanco v. United States,[44]

In order to insulate itself from liability and responsibility for the operations of the vessels while retaining the control, management and, most importantly, the revenues of the vessels, Equilease devised a complex financial scheme wherein Equilease:

a) transferred the vessels to three wholly-owned shelf corporations (the Unilease companies) which were totally dominated and controlled by Equilease;

b) created purported, but, in actuality, fictitious preferred ship mortgages in its favor, the

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41. 598 F.2d 676 (1st Cir. 1979).

42. 33 F.2d 94, cert. denied 280 U.S. 589, 50 S.Ct. 37, 79 L.Ed 638 (1929).

43. 163 F.2d 286 (1st Cir. 1947).

44. 775 F.2d 53 (2nd Cir. 1985).

obligations under which the Unilease Companies could not repay;[45] and

c) caused the Unilease Companies to transfer the vessels by "Bareboat Charter Parties" to an insolvent corporation (Solar).

This Court has previously recognized that a "bareboat" or "demise" charter is "tantamount to, though just short of, an outright transfer of ownership".[46] This decision has been interpreted to mean that to be a true demise charter, the agreement must be watertight, without any intrusion of control by the owner into the management and/or operations of the vessel, either in form or substance. With

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45. The recordation of the "preferred ship mortgages" had the desired effect in that the other creditors of the Vessels thought their liens to be inferior to the mortgages and did not have the legal resources to contest the validity. It was not until the trial of this matter that the mortgages were shown to be invalid. Nevertheless, Equilease re-obtained title to the Vessels based upon foreclosures of the fallacious "preferred ship mortgages".

46. Guzman v. Pichirilo, 369 U.S. 698, 699, 82 S.Ct. 1095, 1096.

respect to the elements of intrusions in this case, it was shown at trial that:

a) Equilease caused the original charterer (Solar) to create a new corporation and transfer the charter parties to Dunnamis;

b) Dunnamis, the charterer, was capitalized in whole or in part by Equilease;

c) Equilease approved, advanced and paid the initial operating expenses of Dunnamis and also established the manner in which the books and records of Dunnamis would be maintained;

d) Equilease approved the selection of the agent to market the vessels, retained the right to approve all contracts, entered into direct negotiations involving the terms, conditions and hire of charter parties and towage agreements between Dunnamis and third parties;

e) The charter parties provided that "all operations, revenues and expenditures shall be approved by owner (Equilease) in its sole discretion";

f) Under an assignment and security agreement, all revenues to be derived from the vessels were assigned to Equilease;

g) Equilease required Dunnamis to constitute and appoint Equilease to be its true and lawful attorney-in-fact with full and irrevocable power and authority.

h) Treating Dunnamis as its own operating subsidiary, Equilease required Dunnamis:

   i) to provide monthly reports of all revenues and expenses;

   ii) to forecast revenues and expenses for the coming month with quarterly reports and projections of revenues and expenses for the coming quarter; and

   iii) to submit an analysis of any deviation of the projections for the prior quarter.

As stated by this Court:

> Thus, assuming arguendo, a demise charter party would isolate the owner from liability, the owner has the burden of showing such a charter. This burden is heavy, for Courts are reluctant to find a demise when the dealings between the parties are consistent with any lesser relationship.[47]

The existence of only one of the above indicia of ownership should be sufficient to defeat the finding of a valid charter party which would enable the owner to insulate itself from the liabilities and responsibilities of the vessel.

It is suggested that the retention of control and management of the Vessels by their true owner is not "tantamount to, though just short of, an outright transfer of ownership"[48]. To permit an operating agent to be clothed in the garments of a bareboat charterer or to permit a vessel to sail under false flags of ownership, mortgage and charter in order to insulate the true owner from liabilities would

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47. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 1097.

48. Guzman v. Pichirilo, 369 U.S. 698, 82 S.Ct. 1095, 1096.

foster fraud, deceit and chicanery in marine transactions.

The form of the charter parties was barnacled with security agreements, powers of attorney and assignments. The substance of the charter parties was a sieve through which the control, management, and operations of the Vessels by the true owner freely flowed. The form of the documents and the substance of the transaction clearly and completely indicate that there was no complete surrender of management, custody and control to the charterer and that the charter parties were executed to contrive a scheme to shield the true owner from the responsibilities and liabilities of the Vessels.

CONCLUSION

Not since this Court handed down its rulings in Dampskibsselskabet,[49] and Guzman,[50] has it

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49. 310 U.S. 268, 60 S.Ct. 937, 84 L.Ed. 998 (1940).

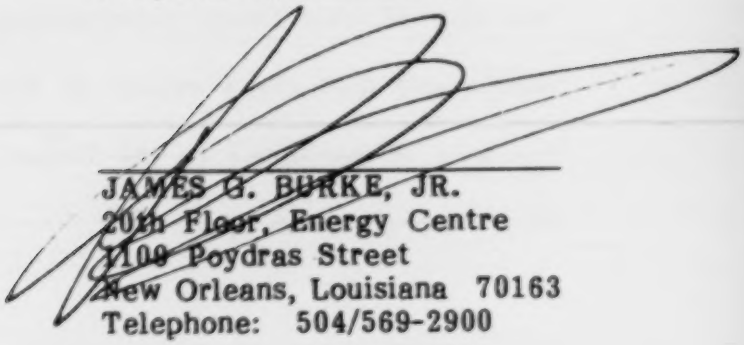
50. 369 U.S. 698, 82 S.Ct. 1095, 8 L.Ed. 518 (1962).

reviewed and commented upon the FMLA and the elements of a valid charter. This petition provides this Court with the opportunity to re-chart the prevailing waters of admiralty law in areas of ownership, mortgage, lien and charter. Without such pilotage, the trial and appellate courts will be faced with uncertainty and unnecessary litigation due to the confusing and conflicting opinions between and within the Circuits.

Additionally, it is suggested that this petition provides a factual situation wherein this Court may establish definitive guidelines for what is "clearly erroneous" for the appellate courts deciding the subjective intent of an individual and interpreting unambiguous language of a written contract.

It is suggested that in granting certiorari, this Court would be given the opportunity to stem the tide of litigation that will congest the trial and appellate dockets by re-establishing the channel markers and buoys for the guidance of the marine industry and admiralty bar.

Respectfully submitted,



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Attorneys for Petitioner

CERTIFICATE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the petitioner herein and that three copies of the above petition for writ of certiorari to the United States Supreme Court were served upon:

PHILIP A. FRANCO, ESQ.
Adams & Reese
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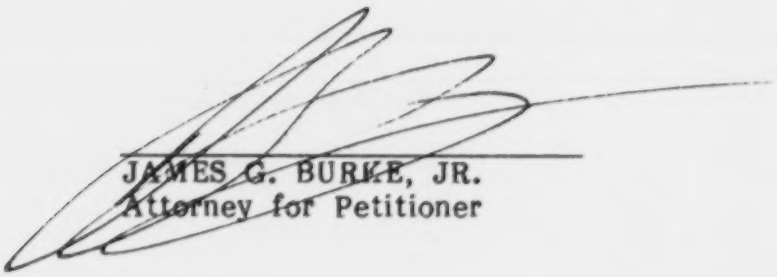
counsel for the respondent, first class postage prepaid, this 14th day of July, 1986.



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